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No. 87-470

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Video Software Dealers Association (VSDA) hereby respectfully requests leave to file the accompanying Brief Amicus Curiae in support of petitioner in the above-captioned case.[1] Petitioner has consented to VSDA's participation but the Respondents have not. Since VSDA believes that the result of this case can have a profound impact on the First Amendment rights of its members and their customers, it regrets that Respondents' action requires VSDA to request leave of the Court to file the attached Brief.

VSDA is the primary national trade association of entities renting, selling and distributing prerecorded video programming to the public. VSDA is composed of over 3,000 regular members, representing 15,000 to

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[1] This case has been consolidated with *Sappenfield v. State of Indiana*, No. 87-614. VSDA is not seeking leave to participate in the *Sappenfield* case.

20,000 of the approximately 25,000 retail video outlets in the United States. VSDA also serves as the representative of the majority of the nation's distributors of prerecorded video material and has as associate members the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

The sale and rental of video cassettes for home viewing is a rapidly growing industry that is serving ever increasing numbers of the public. The number of homes with video cassette recorders has soared from only 2.7 percent of the nation's television households in 1980 to 49.7 percent in 1987. Nationwide, an average of 75 million films are rented each week.[2] This tremendous expansion in the number of video cassette recorders and in the number of video cassettes rented or sold establishes video cassette use as a highly desirable and socially prevalent medium of expression. It is one that, like books and magazines, gives individual consumers the freedom to choose what they will view in the privacy of their homes.

There are over 17,000 titles available in the United States from which VSDA members may select the films to be offered their customers. Typically, VSDA members carry an average of approximately 2,400 different titles, including motion picture films, sporting events, documentaries, musical productions and educational aids.[3] Of the

[2] The *Washington Post* reported on August 28, 1985 the historical 1980 population of VCRs in the United States. *Communications Daily* reported on August 20, 1987 at 5, the vast increase in these devices, citing Nielsen figures. Statistics on the number of video software rentals per week were supplied to VSDA by Alexander & Associates, a consumer marketing consultant for the home entertainment industry.

[3] Unless otherwise noted, the following factual material is taken from a 1986 VSDA Annual Survey, which is a report on the business operations of a representative group of the regular members of VSDA.

titles available, some 3,300 have been characterized by their producers as adult films.[4] This classification is generally based on subjective criteria since the Motion Picture Association of America does not rate all films and there is no formal rating system for "adult" films.[5]

Given the sizable library of titles available to VSDA members and the substantial number of titles they must carry to meet consumer demand, it is not possible for the individual dealers to review each title to determine whether or not a film is obscene—even if one assumes that the standard for obscenity is clear enough for the individual retailer to apply it. Thus, the decision below threatens the ability of VSDA members and other retailers of video programming to continue offering not only these "adult" films but a far wider variety of programming as well.

That decision allows a prosecutor to seize books, video cassettes, magazines and other material presumptively entitled to First Amendment protection based on *ex parte* affidavits alleging that the material is the product of a criminal enterprise in which two obscene articles had been sold or distributed, without the need for an adversarial judicial determination that the seized material was obscene. Indeed, the court below did not require that the State comport with any of the requirements that this Court has imposed on those seeking to silence obscene materials, but allowed the State to confiscate the contents

[4] Videolog (video title looseleaf service), issue 33-1, August 14, 1987. These figures represent the number of films marketed by typical video retail stores within the United States.

[5] Characterizations of the films are made on the basis of distributor information which may not be applicable in certain jurisdictions where standards for what is or is not an "adult" film may differ. According to data available to VSDA, approximately 77% of its members carry "adult" films and those films equal about 13% of its their inventory.

of petitioner's bookstores based on an *ex parte* allegation that petitioner had sold at least two obscene books.

If the judgment below is not reversed, it will force VSDA's members and thousands of other retailers and distributors of video cassettes to avoid the distribution, rental or sale of films containing nudity or any other material that might result in a charge that the films are obscene, without regard to the artistic or cultural value of the films. This case, therefore, raises serious constitutional concerns threatening the First Amendment rights of VSDA's members and other distributors of literary and video material. The decision below also diminishes the public's ability to obtain films and other material that a local prosecutor, for whatever reason, may claim to be obscene. Given the sanctions authorized under the statutes on which the prosecutions below rested, sanctions that included the forfeiture of the entire inventory of a store and the loss of the right *ever* to engage in a similar business, these statutes will, unless invalidated by this Court, leave VSDA's members and other vendors of First Amendment materials little choice but to offer only the innocuous and the safe.

VSDA believes that such a result cannot be reconciled with the First Amendment and the decisions of this Court requiring that regulations affecting speech be carefully crafted to protect First Amendment values. As the representative of the nation's video cassette industry, VSDA believes that its participation in this proceeding will facilitate the Court's understanding of the issues raised and their implications for the full, free and unfettered enjoyment, in the privacy of the home, of programming that video cassettes have made available to the American people. Based on these reasons, this Court granted VSDA leave to participate as an *Amicus Curiae* in support of the Petition for Certiorari and, for the same reasons, VSDA respectfully requests leave to participate on the merits of the case by filing the attached Brief *Amicus Curiae*.

Respectfully submitted,

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BRIEF OF VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

VSDA is the national trade association of the distributors and retailers of video cassettes that are rented or sold for use in the home. As demonstrated more fully in its accompanying Motion for Leave to File this Brief, VSDA is concerned that, unless the decision below is reversed, its approximately 3,000 members will be forced to limit the types of movies and other material they presently make available to the public. Under that decision, the State may, without any prior finding of obscenity,

subject VSDA's members to the most onerous sanctions, including the loss of their businesses, if they offer cassettes of movies that contain nudity or other material that some might claim to be obscene. This power to silence VSDA's members and other retailers or distributors of films and prerecorded video programming will profoundly chill their First Amendment rights and will deprive the public of access to quality movies and other programs that enjoy full First Amendment protection. It is to protect those interests that VSDA is participating in this proceeding.

STATEMENT OF THE CASE

This case presents the issue of whether the Indiana Racketeer Influenced and Corrupt Organizations law ("RICO") may be employed, consistent with the First Amendment, to confiscate books, movies and other forms of speech where there has been (a) no prior conviction for obscenity, the underlying criminal offense on which the State bases its right under RICO to confiscate the material, and (b) no judicial determination that the material confiscated is obscene.[1]

In the decision below, the Indiana Supreme Court upheld the constitutionality of the Indiana RICO and Civil Remedies for Racketeering Activity ("CRRA") statutes against First Amendment challenges on the grounds that they were intended to attack criminal racketeering and that any impact they might have on First Amendment rights was irrelevant to their constitutionality. *See 4447*

[1] While this case involves the Indiana RICO statute, that statute is based on the federal RICO statute, *Alvers v. State*, 489 N.E.2d 83 (Ind. App. 1986), and is similar to the RICO statutes in a substantial number of other states. Thus, this Court's resolution of the questions raised here will affect the manner in which those statutes are enforced nationwide.

Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987). Under the RICO statute, violations of the State's obscenity laws are predicate offenses and permit prosecutors to seek both criminal and civil sanctions under the CRRA. Those sanctions include, *inter alia*, confiscating the assets of a bookstore deemed to have distributed two or more obscene books, prohibiting a violator from investing in, or operating, a similar enterprise, suspending a violator's business licenses or revoking its corporate charter.[2] Under the decision below, these sanctions may be imposed regardless of their effect on protected speech.

The proceedings below commenced with two separate enforcement actions that were subsequently consolidated. In one, prosecutors obtained an order to padlock an unopened bookstore on the basis of allegations that its owners operated two other bookstores that distributed obscene material. The Indiana Court of Appeals granted a stay of that order while the store owner appealed the lower court's denial of his motion to vacate the padlocking order. *Id.* at 561-62. In the other proceeding, prosecutors obtained a court order to padlock three stores and seize their contents on the basis of prior obscenity convictions. No stay of that order was issued. *Id.* at 562-63. In both cases, the orders authorizing the seizure and padlocking were issued on the basis of *ex parte* hearings with no notice to the store owners. In neither action has any trial yet been held to determine whether the stores closed contained any obscene material; instead, the initial padlocking orders were justified on the basis of allegations that the store owners *had* previously sold obscene material.

[2] See Indiana Code § 35-45-6-2(a) (RICO statute); Indiana Code § 34-4-30.5-2 (CRRA sanctions applicable to RICO violations). *See also* Indiana Code § 34-4-30.5-3(a) & (b) (forfeitures for RICO violations.) *See generally 4447 Corp.*, 504 N.E.2d at 560-61.

On appeal, the Indiana Court of Appeals vacated the orders of the lower courts sanctioning the padlocking and seizures. Citing this Court's language that " 'the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised . . .,' " *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 583 (Ind. App. 1985), *quoting Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), the court of appeals held that the State statutes must be subject to "searching and realistic scrutiny," 479 N.E.2d at 584, since they infringed on petitioner's right to distribute and exhibit materials that were presumptively protected. The court found that, while the State unquestionably has an interest in restricting obscene speech, that authority is not unfettered, but " 'must be carefully limited' " lest protected speech be suppressed with the obscene. *Id.* at 585, *quoting Miller v. California*, 413 U.S. 15, 23-24 (1973).

The court of appeals went on to hold that the Indiana RICO and CRRA statutes failed that constitutional test on several independent grounds. First, it concluded that the challenged statutes were a prior restraint that impermissibly interfered with protected expression. 479 N.E.2d at 585-92. Second, it held that the statutes did not provide the procedural protections required before even obscene speech may be suppressed *Id.* at 593-98. Third, it found that, even if the statutes were viewed as content-neutral regulations that had only an incidental impact on speech, they did not satisfy the First Amendment because the State's legitimate regulatory goal could be achieved in a more narrowly tailored manner. *Id.* at 598-601.

The Indiana Supreme Court rejected this analysis and upheld the statutory scheme in its entirety. It reasoned that the statutes were aimed at fighting organized crime and thus the purpose of the padlocking and forfeitures ordered in the lower proceedings were unrelated to the

nature of the assets involved. According to the court, "it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene," *4447 Corp v. Goldsmith*, 504 N.E.2d at 565, for what is relevant is whether they are the product of a RICO violation. *Id.* at 564. Further, the court held it was not necessary for it to determine whether the defendants had been convicted of obscenity before the sanctions authorized by CRRA could be used; all that need be shown is a nexus between the confiscated property and the allegation that its owners had engaged in criminal conduct. *Id.* at 565-66. The court found that applying the First Amendment to the forfeitures involved would erect a "pseudo-constitutional barrier" to a State statute designed solely to combat racketeering. *Id.* In so ruling, the court swept obscenity cases into the general mill of anti-racketeering enforcement actions and equated obscenity violations with gambling, prostitution or loansharking.

Finally, the Indiana Supreme Court held that a defendant whose property has been seized pursuant to the statutory scheme is afforded due process by a "prompt" adversary hearing on a motion to vacate or, if such a motion is denied, by an adversary hearing on the question of forfeitures held within a "reasonable" time. *Id.* at 567. The court did not specify what these "prompt" or "reasonable" times might be; nor did it address the time frame for appellate review of such hearings, although petitioner in this case was unable to secure appellate review for over a year while its bookstores remained padlocked and their inventories were held in police custody.

Petitioner sought certiorari from this Court to review the constitutionality of this enforcement scheme and this Court granted the Petition on March 6, 1988. *Fort Wayne Books, Inc. v. State of Indiana*, 108 S.Ct. 1106 (1988).

SUMMARY OF ARGUMENT

The court below upheld the padlocking of petitioner's bookstores and the confiscation of their inventories on the grounds that those sanctions were designed to deny those engaged in racketeering the benefits of their illegal conduct. The court found that it was irrelevant that the goods being confiscated were books and that the bookstores targeted by the prosecutors were presumptively entitled to First Amendment protection. That rationale is inconsistent with the decisions of this Court holding that governmental action is to be tested on the basis of the right or interest affected and not the power being exercised. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Thus, the court below erred when it ignored the nature of the goods confiscated and concluded that it was irrelevant that the targets of the State's enforcement actions were bookstores.

The Indiana RICO and CRRA statutes upheld by the court below authorize classic prior restraints. These prior restraints include prejudgment padlocking and seizures, permanent forfeitures of bookstore inventories, and orders preventing persons from ever again opening or operating a bookstore or distribution system for speech. Moreover, the prejudgment sanctions can be imposed on the basis of *ex parte* allegations that defendants distributed obscene material. This Court has never upheld statutory or regulatory provisions that permit such severe infringement of speech and has condemned on First Amendment grounds similar broad brush governmental sanctions that affect First Amendment interests. *Near v. Minnesota*, 283 U.S. 697 (1931). Thus, the vast majority of courts that have addressed the issue have concluded that sanctions virtually identical to those employed by the Indiana statutes are unconstitutional.

The RICO and CRRA statutes upheld below cannot be justified as merely imposing another criminal sanction

for violating laws proscribing unprotected obscene material. They lack the safeguards associated with criminal prosecutions and foreclose speech at its inception rather than punishing those whose conduct is illegal. These statutes suppress far more than obscene material; they prevent the distribution of speech before there has been any determination that the material is in fact obscene. Further, they authorize draconian sanctions—including *permanent* restraints on speech—in civil proceedings in which the government need only meet the "preponderance of the evidence" test. However, where fundamntal rights are involved, this Court has required that a more substantial burden be imposed to impress upon the fact finder the importance of the determination and to preserve fundamental fairness. *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The Indiana statutes also fail in numerous respects to comply with the procedural requirements applicable to restraints even on obscene material. As this Court has consistently held, regulatory provisions designed to prohibit obscene speech must be carefully crafted lest they suppress protected speech as well. *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The RICO and CRRA statutes upheld below cannot be reconciled with these requirements; rather than employing "sensitive tools," these statutes employ a bludgeon that indiscriminately suppresses protected and obscene speech. As a result, Indiana's statutes chill the distribution of protected speech and deny the public access to the diversity of thoughts and ideas the First Amendment was designed to promote.

ARGUMENT

I. Labeling Conduct As "Racketeering" Does Not Obviate the Requirement that the Regulation Be Tested Under the First Amendment

The court below found it unnecessary to determine whether padlocking bookstores or confiscating the materials in them infringed any First Amendment rights on the ground that the statutory provisions challenged here were not designed to foreclose speech but to deny those engaged in racketeering the benefits of their criminal enterprise. According to the court, the books that were seized were no different than clothing, furniture, hardware, gambling receipts or anything else that might have been acquired as a result of criminal conduct. As far as the court below was concerned, if the material seized was acquired as a result of a violation of the obscenity laws and thus a predicate offense under RICO, the material could be taken as if it were the bounty of a pirate ship.

The difficulty with this analysis, however, is that the criminal enterprise on which the State justifies its action is not itself devoid of communicative content and the target of the RICO sanctions were bookstores—one of the primary vehicles for the dissemination of protected speech. *See Schad v. Borough of Mount Ephraim*, 452 U.S. at 66; *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Stromberg v. California*, 283 U.S. 359 (1931). Thus, the material confiscated, while perhaps the product of violations of the obscenity laws, nonetheless enjoys a heightened place in our constitutional hierarchy, unless it is obscene or otherwise among the very few classes of speech subject to limited constitutional protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. O'Brien*, 391 U.S. 367, 376 (1967); *Dennis v. United States*, 341 U.S. 494 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Consequently, the application of the First Amendment to this conduct hardly constitutes a "pseudo-constitutional" protection of criminal conduct, as the court below reasoned, but rather is an essential part of the protection the Founding Fathers afforded speech from the State's very broad police powers. *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. Struthers*, 319 U.S. 141, 193 (1943).

If the decision below is not reversed, a State could regulate a wide range of speech, including political speech, by making its utterance, or conduct associated with it, a criminal offense and a predicate to the application of RICO sanctions of the type invoked here. As noted above, the enforcement scheme upheld below would permit the imposition of the sanctions used against petitioner without any provision for a judicial determination that a crime has been committed. The only relevant question would be whether the property seized had a nexus to the speech that the State alleged to be unlawful.[3]

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[3] It is no answer to the constitutional infirmities of the decision below to assert that those affected could challenge in another proceeding whether they were guilty of the "predicate offense." Except in rare circumstances not present here, it is well established that those subject to the power of government have the constitutional right to challenge the basis of the exercise of that power at the time it is applied, and need not take the affirmative and challenge the statute before it is applied to them. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). That is particularly true in the First Amendment area where the mere prohibition of certain types of speech can pretermit its utterance and deny the public the ability to hear the viewpoint that is now "illicit." *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protect[s] the right to receive information and ideas," as well as the right to disseminate it.) *See also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Board of Education v. Pico*, 457 U.S. at 866-67; *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

As the court of appeals recognized, however, such a result cannot pass even the most casual First Amendment review. That Amendment was designed to protect the unpopular and the expression of views contrary to those in power. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). For that reason, this Court has consistently held that state regulatory activity is to be tested on the basis of the right or interest affected and not the power being exercised. *Schad v. Borough of Mount Ephraim*, 452 U.S. at 68.

Consistent with that injunction, this Court has regularly held that standards for suppressing gambling and similar crimes cannot establish the level of constitutional protection for regulations aimed at speech. *E.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 (1980); *Quantity of Books v. Kansas*, 378 U.S. 205, 211-12 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961). Nor can penalty schemes for non-expressive activities be applied to expressive activity, even if that activity is the distribution of unprotected obscene material, where the effect is to diminish or frustrate speech. *Smith v. California*, 361 U.S. 147, 152-53 (1959).

Unlike enforcement schemes aimed at other criminal activities, making the distribution of obscene speech a criminal offense requires that the State act with care not to suppress protected speech at the same time. Thus, this Court has frequently admonished those seeking to regulate the obscene that they must use "sensitive tools" that do not unconstitutionally sweep speech that is sexually-explicit but not obscene into the net of the state's enforcement mechanism. *Miller v. California*, 413 U.S. at 23; *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The court below ignored these holdings when it concluded that the nature of the conduct regulated as well as the nature of the ill-gotten gains were irrelevant to the legality of the sanctions imposed. In so doing, it crossed

the line between permissible regulation of criminal conduct and the unconstitutional regulation of speech. The protections of the First Amendment are not limited to statutes regulating speech directly, but extend to regulations designed to achieve legitimate governmental objectives which incidentally affect speech as well. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *United States v. O'Brien*, 391 U.S. 367 (1967). While the government's burden to justify regulation is greater when the regulation directly affects speech than where it only indirectly affects it,[4] the mere fact that the regulation was designed to achieve a legitimate non-speech goal does not immunize it from First Amendment analysis. *Compare Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) *with United States v. O'Brien, supra. Cf. Arkansas Writer's Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1727 (1987) ("illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). Consequently, the basis of the Indiana Supreme Court's holding cannot be sustained.

II. Indiana's Application of RICO Sanctions to the Distribution of Allegedly Obscene Speech Is An Unconstitutional Prior Restraint

A. The Use of the RICO Sanctions Here Is a Classic Prior Restraint

Both the pre- and postjudgment remedies authorized in Indiana's RICO and CRRA statutes impose numerous prior restraints on speech that is presumptively protected. They do so by authorizing:

(1) prejudgment padlocking and seizures;

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[4] *Widmar v. Vincent*, 454 U.S. 263 (1981); *U.S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

(2) permanent forfeiture of all inventory and instrumentalities of a retailer or distributor of communicative material;

(3) license suspension or revocation;

(4) corporate charter revocation; and

(5) injunctions ordering violators not to participate in any future endeavors similar to the bookstores or video stores from which they distributed obscene materials.

Each of these measures prospectively suppresses speech, with no attempt to prove that all, or even a significant portion, of that speech is unprotected.

This Court has never upheld regulatory tools that infringe so deeply on speech and that are so inconsistent with the notion that regulation in the First Amendment area must be undertaken with "sensitive tools." *See, e.g., City of Houston v. Hill*, 107 S. Ct. 2502, 2510-11 (1987); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Speiser v. Randall*, 357 U.S. at 525. Under the reasoning of the court below, the RICO/CRRA statutes used here could be employed to confiscate the works of H.L. Mencken, Walter Lippman, John Stewart Mill, Montesquieu or the Founding Fathers themselves—political speech that lies at the heart of the First Amendment's protection—as long as that speech is tied to a predicate criminal offense under RICO, including a speech-related predicate.

Yet, "[t]he primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message." *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976). *See also First National Bank of Boston v. Bellotti*, 435 U.S. at 777; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. at 564. This interest in assuring society access to the maximum diversity of views[5] requires that sanctions be imposed only for specific, proven transgressions and not to an undifferentiated class of books or movies. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Spokane Arcade, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).

The dragnet approach to the obscenity laws employed by the Indiana RICO and CRRA statutes is similar to the blanket approach employed by the Minnesota public nuisance abatement statute in *Near v. Minnesota*, and suffers from the same First Amendment defects. Thus, this Court's analysis of that statute applies equally to the statutes in issue here. To paraphrase this Court:

> The object of the statute is not punishment, in the ordinary sense, but suppression of the offending [bookstore]. The reason for the enactment . . . is that prosecutions to enforce penal statutes for [obscenity] do not result in "efficient repression or suppression of the evils of [obscenity]." Describing the business of publication as a [racketeering offense], does not obscure the substance of the proceeding which the statute authorizes.
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> • • • •
>
> If we cut through the mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner [of a bookstore] before a judge upon a charge of conducting a business of [distributing obscene material] and

[5] *See, e.g., Base Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534 (1980); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> unless the owner . . . is able and disposed to bring competent evidence to satisfy the judge that the charges are [unfounded] his [bookstore] is suppressed . . . . *This is of the essence of censorship.*[6]

There is little question but that, as the Indiana Court of Appeals recognized, the prejudgment sanctions available under the Indiana RICO and CRRA statutes represent the same form of virulent prior restraint as the injunction issued in *Near*. 479 N.E.2d at 587. Regardless of whether the goals of the nuisance abatement statute in *Near* and the goals of the RICO and CRRA statutes here are noble or whether the evils to which they are directed are worthy of legislative action, the statutes themselves reflect an excess of zeal by banning the good with the bad. Not surprisingly, therefore, the vast majority of courts that have addressed the issue have concluded that similar statutes fail to pass First Amendment muster.[7]

Similarly, courts have "roundly condemned" statutes that authorize the withholding of business licenses or the forfeiture of those licenses based on prior convictions for the distribution of obscene material. In *Genusa v. City*

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[6] 283 U.S. at 711, 713 (emphasis added). This Court has stated "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Southeastern Promotion, Ltd. v. Conrad*, *supra*; *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971) (White, J., concurring); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

[7] *See People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600 (Cal.), *cert. denied*, 429 U.S. 922 (1976); *Commonwealth ex rel. Davis v. Van Emberg*, 464 Pa. 618, 347 A.2d 712 (1975); *Gulf State Theatres of Louisiana v. Richardson*, 287 So.2d 480 (La. 1973); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971). *See also Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981); *Vance v. Universal Amusement Co., Inc.* 445 U.S. 308 (1980).

of Peoria, 619 F.2d 1203, 1219 n. 40 (7th Cir. 1980), for example, the court stated:

> We know of no doctrine that permits the state to deny to a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense.

In *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983), the court held that a city ordinance providing for revocation of a theater or bookstore license for one year where the owner had been convicted of an obscenity violation imposed an unconstitutional restraint on presumptively protected expression. In language that is appropriate to this case, the court held that:

> [T]he City can no more impose such a prior restraint on the plaintiff than could it by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.

Id. at 1552. *See also City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S.Ct. 316 (1986).

Indiana's RICO and CRRA statutes cannot be distinguished from this authority. "The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or obscenity statutes." *State of Arizona v. Feld*, 745 P.2d 146, 156 (Ariz. App. 1987), *cert. denied*, 56 U.S.L.W. 3666 (U.S. Mar. 29, 1988) (No. 87-1246).[8]

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[8] *See generally Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *Yuclan Enterprises, Inc. v. Arre*, 488 F. Supp. 820 (D. Haw. 1980); *Natco Theatres, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979); *Perrine v. Municipal Court*, 5 Cal.3d 656, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

B. RICO Enforcement Mechanisms Are Not Equivalent to Subsequent Criminal Enforcement

Although it is well established that the publication or distribution of obscene material can be made a crime,[9] the Indiana laws here cannot be justified by equating them with criminal prosecutions. First, criminal sanctions are not intended to *ban* the publication of material, but to *punish* those engaged in illegal conduct. Thus, criminal sanctions do not deny the public access to differing ideas or viewpoints but only penalize those who utter speech without constitutional protection. Further, criminal statutes leave to the citizen the right to make a choice as to what type of material to distribute [10] and afford him or her the full range of the protections of the criminal law before he or she may be convicted. The RICO/CRRA sanctions here, however, afford no such protection and are designed to stop speech at its inception.

Second, the RICO/CRRA sanctions, as upheld by the court below, prevented the distribution of speech before there had been any finding of a criminal violation or any determination that the material confiscated was obscene. Rather than punishing petitioner based on a conviction of uttering obscene speech, the court below authorized the confiscation of material—some of which presumably was fully protected by the First Amendment—based on an *ex parte* representation that petitioner had in the past distributed obscene material. This Court has never sanctioned such draconian use of power where First Amendment interests are at stake. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70.

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[9] *See Miller v. California, supra*; *New York v. Ferber*, 458 U.S. at 754; *United States v. 12 200-ft Reels of Film*, 413 U.S. 123 (1973); *Ginsburg v. New York*, 390 U.S. 629 (1968).

[10] *See generally* Hart & Sacks, *The Legal Process, Basic Problems in the Making and Application of Law*, at 132-34 (Tentative ed. 1958).

Third, we have been unable to find any decision in which this Court has upheld, or indeed even been faced with, a penalty that permanently restrained speech. Clearly, penal sanctions for violating the obscenity statutes do not involve such a ban.

Fourth, as interpreted by the court below, property may be confiscated and bookstores padlocked in a civil proceeding in which the State can show that the property was derived from criminal conduct that is a predicate to the application of RICO sanctions. No showing is required that petitioner was guilty of distributing obscene material. It is sufficient, under the decision below, that a causal nexus exists between the property the government seizes and the conduct which the government alleges was illegal. Moreover, that conduct can be established in an *ex parte* proceeding. That standard is not in keeping with this Court's admonition that the government must protect speech from over-zealous prosecutors, who may be well intended but who, for whatever reasons, are not sufficiently sensitive to First Amendment values.[11]

Ultimately, the application of the RICO/CRRA forfeitures to speech violations must be seen for what it is: an attempt to circumvent the burdens and difficulties in obtaining a conviction under this Court's rules applicable to obscenity prosecutions. Those carefully crafted rules, however, were not designed to thwart governmental efforts to suppress obscenity but to insure that those efforts did not sweep more broadly and encompass fully protected speech. *E.g., Miller v. California*, 413 U.S. at 18-20. Thus, just as the statute in question in *Near* was found to violate the First Amendment because it stifled speech without any determination that the State had the right to regulate that speech, so too the RICO and CRRA

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[11] As Mr. Justice Brandeis noted, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

statutes here authorize the seizure of books, records and other modes of expression without any proof that they are illegal. Consequently, rather than using the surgical knife required by this Court to regulate in this area, the State has employed a blunderbuss. That statutory scheme cannot survive First Amendment analysis.

III. The Lack of Procedural Safeguards and the Use of the Lowest Civil Standard of Proof Renders the Use of the RICO and CRRA Statutes Here Unconstitutional

A. The Indiana Statutes Do Not Provide for Prompt Judicial Review of Enforcement Actions

The procedural infirmities of the Indiana RICO and CRRA laws, both facially and as applied in this proceeding, are clear. Massive seizures of materials that have not been found to be obscene or otherwise unprotected cannot be based on *ex parte* representations, *Marcus v. Search Warrant*, *supra*; *Quality Books v. Kansas*, *supra*; and padlocking orders of indefinite duration can not be justified at all. *Vance v. Universal Amusement Co.*, *supra*; *Freedman v. Maryland*, *supra*.

Although the court below attempted to avoid these constitutional infirmities by requiring an adversarial hearing within a "prompt" or "reasonable" time after the seizure order, it failed to establish that time frame and thus failed to cure a fundamental defect in the statutes.[12]

[12] It is far from clear that, even if the court below had specified a prompt time period in which the adversarial hearing had to be held, it would have cured this defect in the enforcement scheme. While a prompt hearing within a specific time frame might satisfy the due process requirements of the First Amendment, the court below made it clear that the State had the right to confiscate literary and cultural material without regard to whether the material itself was obscene as long as petitioner had engaged in the predicate offense. Thus, the approach set forth by the court below would not assure that petitioner could attack the underlying statute. Rather, the rationale of the court below would appear to allow petitioner to question only the causal connection between the predicate offense and the property subject to confiscation. That limited scope of review is not sufficient to protect the First Amendment issues at stake here.

Further, the statutes do not provide for prompt appellate review of the initial judicial decision, and, in fact, in this case appellate review took over a year and was achieved in one case only after the parties sought relief from a Justice of this Court.[13] Such procedural provisions cannot be reconciled with the requirements of this Court's decision in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). *See also Freedman v. Maryland*, 380 U.S. at 58-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70.

Consequently, the Indiana statutes do not comply with the procedural requirements this Court has established for legislation regulating speech. These statutes permit Indiana prosecutors to drag owners of bookstores, video stores, magazine retailers and distributors of protected materials into the labyrinth of RICO enforcement proceedings without appropriate judicial protection. Businesses can be ruined and protected speech suppressed for extended periods without any redress or any means of protecting the public's First Amendment interests.

B. Indiana's Use of the Lowest Civil Burden of Proof For Invoking RICO/CRRA Sanctions Does Not Adequately Protect First Amendment Interests

Not only does the Indiana enforcement scheme deny those subject to RICO action adequate judicial review, it also permits the State to silence speech by relying on the least stringent standard of proof in civil cases: a "preponderance of the evidence." Under the Indiana Act, video stores renting movies containing nudity or a bookstore selling the works of Henry Miller, D.H. Lawrence

[13] *See Fort Wayne Books v. Indiana*, Docket No. A-734 (Stevens, J.) (April 4, 1985).

or James Joyce can be shut down and the public's ability to view those movies or to read those books can be foreclosed based on a finding that a "preponderance of the evidence" establishes a connection between the video retailer or bookstore and the sale of two obscene items.

Given the serious intrusion on First Amendment interests authorized by those statutes, reliance on the preponderance of the evidence standard cannot be constitutionally justified.[14] That is particularly true given the fine line that frequently exists between that which is obscene and that which has "redeeming social value." *Miller v. California*, 413 U.S. at 20-21; *Roth v. United States*, 354 U.S. 476, 484-85 (1957). Reliance on the "preponderance of the evidence" test does not provide the degree of protection afforded by the "clear and convincing" or the criminal "beyond a reasonable doubt" standards,[15] and subjects a bookstore or video dealer to an in-

[14] VSDA recognizes that in a *per curiam* decision this Court held that nuisance abatement actions aimed at suppressing obscene speech need not be proven by the criminal standard of "beyond a reasonable doubt." *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981). Nevertheless, the Court left open whether the State could rely on the lower civil "preponderance of the evidence standard" or was required to use a more stringent civil standard, *i.e.*, "clear and convincing evidence." On remand, the California Appellate Court concluded that the "clear and convincing evidence" standard was required by the First Amendment before the State could suppress allegedly obscene material. *People ex rel. Cooper v. Mitchell Bros.*, 128 Cal. App.3d 937, 180 Cal. 728, *cert. denied*, 459 U.S. 944 (1982).

[15] VSDA believes, for the reasons set forth by Mr. Justice Brennan in *McKinney v. Alabama*, 424 U.S. 669, 683-84 (1976), that the proper burden of proof in cases such as these, where the "civil sanctions" are as pernicious as most criminal sanctions, should be the criminal standard. No other standard provides the same protection of society's interest in assuring the availability of the widest range of social, cultural and political thought. However, in light of this Court's holding in *Mitchell Bros.*, the State would appear to have the right to employ a civil standard of proof not-

creased risk that a miscalculation of the boundary between obscene and protected speech will result in the confiscation of the dealer's inventory and loss of his or her license to earn a living. *See McKinney v. Alabama*, 424 U.S. at 683-84 (concurring opinion). Consequently, if the public's interest in an informed and educated public is to be fully protected, the harsh punishments of Indiana's RICO and CRRA laws cannot be based on only the "preponderance of the evidence" standard but at least the "clear and convincing" standard must be employed.[16]

The higher burden of the "clear and convincing" standard is no stranger to civil proceedings. This Court has required its use in civil cases involving particularly important civil liberties, *e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation), and it has been applied in cases involving other presumptively protected expressions. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) (libel). *Cf. Hustler Magazine v. Falwell*, 108 S.Ct. 876 (1988). The reason why this higher burden of proof is required was explained in *Santosky v. Kramer*, 455 U.S. 745 (1982), a case involving the loss of parental rights. There this Court stated that the higher burden of proof

withstanding the onerous sanctions authorized by its RICO and CCRA statutes.

[16] VSDA is aware that the difference in burdens is largely one of persuasion rather than the introduction of evidence, but, as this Court held in *Mitchell Bros.*, *supra*, the standard of proof "'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Mitchell Bros.*, 454 U.S. at 92-93, quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J.). Thus, the difference between the degree of persuasion needed to satisfy the "preponderance of the evidence" test and the "clear and convincing" test is important given the profoundly chilling effect of the enforcement scheme here. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

better meets the practical need to preserve fundamental fairness and the symbolic need of impressing upon the factfinder the importance of the decision than does the "preponderance of the evidence."

These same considerations apply here where the State professes the power to silence speech and confiscate material otherwise enjoying full First Amendment protection. Given the strong feelings and vague factual determinations implicit in obscenity proceedings, the higher civil burden of proof is clearly required for the same practical and symbolic interests articulated in *Santosky*.

IV. Indiana's Injunctive Provisions Chill Protected Speech In Violation of the First Amendment

To the owner of a single video store in Indiana faced with government seizure of his entire livelihood and all his savings in any manner connected with the store, Indiana's RICO and CRRA statutes impose an irresistible compulsion to steer clear of films that can even remotely bring down the local prosecutor on the store. To the owner of a chain of stores whose entire business, including unopened outlets, can be suppressed on the basis of a tiny portion of the material distributed at but one of the stores, the statutes here in issue assume a similar significance. So too, for individuals who can be ordered never again to invest in or operate bookstores and for corporations that can have their right to do business and their very corporate existence terminated, these statutes assume an importance and have a chilling effect on speech that cannot be overestimated.

If the First Amendment is to remain a bulwark against governmental intrusion into the free marketplace of ideas these provisions cannot be allowed to stand. With such statutes in effect, bookstores, video retailers, magazine vendors and distributors of various media of communication will avoid material they believe *may* be deemed ob-

scene by the local prosecuting attorney lest they risk *all*. As a result, the public will be deprived of some of the finest books and movies as vendors engage in the self-censorship this Court has consistently held to be antithetical to First Amendment interests. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. Sullivan, supra.*[17]

As the lower courts that have addressed statutes imposing similar sanctions have concluded,[18] Indiana's RICO/CRRA statutes impose too substantial a price on the First Amendment interests of both speakers and listeners to withstand First Amendment analysis. Confiscation, padlocking and the other RICO/CRRA sanctions may be appropriate when aimed at the distribution of non-expressive material that is the product of a criminal enterprise unrelated to speech, but they have no place in the enforcement of statutes affecting speech, where the line between that which is protected and that which is not is necessarily vague and ill-defined. *See New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. at 20-21; *Chaplinsky v. New Hampshire*, 315 U.S. at 571-72.

This Court has consistently held that even regulations designed to achieve a legitimate content-neutral objective must be narrowly drafted to achieve that goal where it has an incidental impact on speech. *United States v. O'Brien*, 391 U.S. at 377. Thus, even if one were to analyze this case in the terms used by the court below, the decision cannot stand. Even if the RICO/CRRA statutes were designed to achieve content neutral purposes, they do so in a manner that suppresses speech unnecessarily.

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[17] It should also be noted that the discretion which these statutes give local prosecutors can also be used to exercise control over speech of those engaged in a communicative medium. Thus, unwanted criticism can be forestalled by threatening enforcement action under the RICO/CRRA statutes.

[18] *See, e.g.*, cases cited at note 7, *supra*.

CONCLUSION

At the outset of this brief, VSDA urged this Court to look at the effect and operation of the Indiana RICO and CRRA laws on the conduct to which they have been applied, rather than accept the State's characterization of them as neutral law enforcement tools. As VSDA has shown, these statutes are not simply law enforcement vehicles, but they also permit the State to reach beyond the obscene, and well into protected speech. The *in terrorem* effect of the sanctions will restrain the distribution of protected speech by those who are fearful of offering material a local prosecutor deems to be obscene.

In this case, the sanctions were imposed on bookstores without any finding that the stores were engaged in the distribution of obscene material or that the material confiscated was obscene. As a result, unless the decision of the court below is reversed, it will have a profoundly chilling effect on the owners of bookstores, video retailers and others, effectively precluding them from making available books or films that might conceivably cross the line from the protected to the obscene. Thus, rather than employing "sensitive tools" to regulate in this First Amendment area, Indiana has elected to employ a bludgeon that censors speech contributing to an informed and cultured society as well as the obscene speech to which it is directed. The decision below upheld those statutes in the face of this and the other First Amendment defects established above; it cannot stand. For the reasons set forth above, VSDA hereby requests this Court to reverse the decision below and declare the Indiana RICO and CRRA statutes unconstitutional.

Respectfully submitted,

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